STATE OF MICHIGAN

COURT OF APPEALS

LISA YOUNG, formerly known as LISA HARRIS,

Plaintiff-Appellant,

v

HARPER-HUTZEL HOSPITAL, doing business as HUTZEL HOSPITAL,

Defendant-Appellee,

and

OTIS ELEVATOR COMPANY,

Defendant.

UNPUBLISHED
February 16, 2010

No. 288406
Wayne Circuit Court
LC No. 06-628352-NO

Before: Gleicher, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

In this premises liability action arising from an elevator misleveling mishap, plaintiff Lisa Young appeals as of right a circuit court order granting defendant Harper-Hutzel Hospital (the hospital) summary disposition under MCR 2.116(C)(10). We affirm.

On June 22, 2004, Young fell while exiting the hospital's Hudson elevator number five.[1] In October 2006, Young filed a complaint asserting premises liability and other negligence claims against the hospital and Otis Elevator Company, which maintained the elevator pursuant to a contract with the hospital. The complaint averred that on the day of Young's injury, the elevator doors "were shaking violently" as they opened, and that when she stepped out "the elevator floor moved, jerked, and suddenly dropped, and did not line up properly with the floor," causing Young to lose her balance and fall. The complaint alleged that Otis Elevator and the hospital failed to reasonably maintain, inspect, and repair the elevator, and failed to warn elevator users of "the unsafe condition existing on the premises."

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[1] At the time of her fall, Young worked for Affiliated Internists, a professional corporation with offices located on the hospital's premises.

In June 2007, the circuit court granted Otis Elevator's motion for summary disposition on the basis of our Supreme Court's opinion in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). Young has not appealed this order. In August 2008, the hospital filed a motion for summary disposition pursuant to MCR 2.116(C)(10), averring that it lacked notice of any elevator malfunction during the weeks before Young's accident, and that Young failed to identify a specific elevator defect that caused her fall. Young responded that during an examination of the elevator on August 13, 2008, her expert witness, Kevin Doherty, detected numerous possible causes for the misleveling event that had occurred four years earlier. The circuit court granted the hospital summary disposition, opining, "I really think [Doherty's] opinions are speculative and pure conjecture. He has no idea what condition that elevator was [in] four years prior when this incident occurred. There's so many possibilities that I have to grant this motion."

Young now challenges the circuit court's summary disposition ruling, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Young first contends that because Doherty identified "the likely causes of misleveling and advanced a number of theories of the causes of [the] misleveling that occurred on June 22, 2004," questions of fact preclude summary disposition. At Doherty's deposition, he summarized his suggested causes of the elevator malfunction as follows:

> Q. Taking … Ms. Young's history [version of events] . . . , what in your opinion would have caused this sudden drop that she reports or she testifies to on June 22nd, 2004?
>
> A. I can speculate on a number of reasons that the elevator would have quote, unquote, dropped.

Doherty proceeded to list the following possible causes of the elevator misleveling: "a problem in the hoist generator loop circuit," "contact failure on the controller," "defective or improperly maintained cartop leveling units," "defective switches on the selector," a "defective regulator board," "a problem with the generator" or the hoist motor, "improperly adjusted or loose" shaft veins, lack of proper "[o]verall maintenance," or a dragging brake assembly. Doherty conceded that he had no knowledge "which particular one [defect] occurred on June 22, 2004," and that no evidence showed that before Young's fall hospital personnel knew "there was a misleveling issue." Doherty further acknowledged that the elevator maintenance records supplied to him included no mention of a misleveling problem after March 2004 repairs by Otis Elevator.

"[A] premises owner has a duty to exercise reasonable care to protect invitees, i.e., persons who enter the premises at the owner's express or implied invitation to conduct business concerning the owner, from an unreasonable risk of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against." *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). In *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), the Supreme Court cited 2 Restatement Torts, 2d, § 343, pp 215-216, for the proposition that an invitor owes a legal "duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." Subsequently, in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), the Supreme Court quoted Restatement § 343 in its entirety and added the following emphasis: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an *unreasonable* risk of harm to such invitees . . . ." Thus, whether an invitor bears liability for an invitee's injuries depends on whether the invitor possessed actual or constructive knowledge of the unreasonably dangerous condition. In *Carpenter v Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937), our Supreme Court set forth the duties of a storekeeper, which apply equally to an invitor like the hospital:

> The proprietor is liable for injury resulting from an unsafe condition caused by the active negligence of himself and his employees, and he is liable when the unsafe condition, otherwise caused, is known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have knowledge of it. [Citations omitted.]

Notice of a possible danger "may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful [invitor] to discover it." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). Therefore, Young bears the burden of demonstrating either that the hospital knew of a dangerous condition involving the elevator or should have known that the elevator posed a risk to its users.

Here, no evidence gives rise to any reasonable inference that the hospital knew or should have known that elevator number five constituted a potential danger. According to Young, Otis Elevator repaired the elevator earlier on the day of her fall and placed the elevator back in service. No record evidence suggests that the elevator mislevelled or otherwise malfunctioned after Otis Elevator completed its work and before Young rode in it. Young points to no facts tending to support that the hospital should have requested additional service from Otis Elevator, placed the elevator out of service, or warned riders of potential problems attending its use. Viewing the evidence in the light most favorable to Young, she has failed to establish that the hospital knew or should have known that on June 22, 2004, riders of the elevator risked injury. We thus conclude that the circuit court properly granted the hospital summary disposition under MCR 2.116(C)(10).

Young next asserts that Doherty's findings of several City of Detroit elevator code violations created an inference of negligence that precluded summary disposition. However, Doherty admitted that he lacked awareness whether the code violations existed at the time of Young's accident, and no evidence shows that a code violation caused the elevator to mislevel. Moreover, Doherty conceded that his theories about the cause of the June 22, 2004 elevator

malfunction amounted to speculation, rather than certainty. The cause in fact element of a negligence claim "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). The plaintiff must introduce evidence affording "a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Id*. at 165 (internal quotation omitted). Although a plaintiff may establish causation circumstantially, "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 163-164. The Supreme Court in *Skinner*, *id*. at 164, distinguished between a reasonable inference and conjecture or speculation by quoting a passage from *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956):

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Viewed in the light most favorable to plaintiff, the evidence here simply does not give rise to a reasonable inference that a 2008 code violation, or any other causation theory advanced by Doherty, explains how or why the elevator malfunctioned in 2004. Because Young failed to present competent evidence tending to prove that any code violations apparent in 2008 caused her injury in 2004, the circuit court properly rejected the alleged code violations as a ground for denying the hospital summary disposition.

Young lastly insists that "destroyed" elevator maintenance records entitle her to an adverse inference under M Civ JI 6.01 "for purposes of deciding" the hospital's summary disposition motion. Doherty expressed that "literally hundreds" of maintenance "tickets" in Otis Elevator's electronic records system had "vanished." According to Young, the hospital's contract with Otis Elevator contemplated the hospital's ability to electronically access Otis Elevator's records, and the hospital's production of two "tickets" demonstrates the hospital's capability to supply complete elevator maintenance and repair reports. The model jury instruction on which Young relies, M Civ JI 6.01, sets forth the contours of the adverse inference that a jury may draw from a party's failure to produce evidence. The instruction entitles the jury to draw an adverse inference only when "(1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward v Consolidated Rail Corp*, 472 Mich 77, 85-86, 693 NW2d 366 (2005). Even assuming that the principles contained in M Civ JI 6.01 apply in the context of a motion for summary disposition, Young has not established that the hospital exclusively controlled the elevator maintenance records. Indisputably, Otis Elevator created the "tickets" and maintained a record of them, rendering access to the tickets equally available to Young through Otis Elevator. Young has also neglected to coherently articulate the manner in which any additional maintenance or repair records has impacted her ability to prove the hospital's negligence, as

opposed to that of Otis Elevator. Consequently, the circuit court correctly declined to find that the hospital's failure to produce additional "tickets" precluded summary disposition.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder